



**Toromo t/a Sweet Berry Wines & Spirits – Chepkanga & another v County Government of Uasin Gishu (Petition E009 of 2024) [2024] KEHC 16432 (KLR) (23 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16432 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT ELDORET**

**PETITION E009 OF 2024**

**RN NYAKUNDI, J**

**DECEMBER 23, 2024**

**IN THE MATTER OF VIOLATION OF ARTICLE  
47 OF THE CONSTITUTION OF KENYA, 2010-**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

**AND**

**IN THE MATTER OF INTERFERENCE WITH THE  
RUNNING OF LAWFUL LIQUOR BUSINESS OPERATIONS**

**BETWEEN**

**SHEILA JEPCHUMBA TOROMO T/A SWEET BERRY WINES & SPIRITS –  
CHEPKANGA ..... 1<sup>ST</sup> PETITIONER**

**MOHAMMED ISMAEL SIRIBO T/A CENTRAL BAR ..... 2<sup>ND</sup> PETITIONER**

**AND**

**COUNTY GOVERNMENT OF UASIN GISHU ..... RESPONDENT**

**RULING**

1. Coming up for determination is a Notice of Preliminary Objection dated 20<sup>th</sup> May, 2024 by the Respondent on the grounds that;

That the suit is incurably defective and cannot stand in law;

That the prayers sought in the petition and application cannot issue for non-joinder

That the Honourable Court lacks jurisdiction to hear and determine the application and petition



That the petitioner did not exhaust all the remedies set out under Sections 4, 10, 17 & 18 of the [Uasin Gishu County Alcoholic Drinks Control Act, 2014](#); and

That the suit is premature under the doctrine of exhaustion.

2. The Objection was canvassed by way of written submissions wherein the firm of Wambua Kigamwa & Co. Advocates for the Petitioner submitted that the Preliminary Objection as taken by the Respondent is predicated on a misconception of the law as the uncontested facts in this matter do not relate to a decision cancelling a license, declining renewal, declining transfer of a license or declining to grant a license by the respondent. In the instant case, the Petitioners submitted that licenses remain in force and the same have been exhibited. That they have not been cancelled by the Respondent, the renewal declined, the transfer declined or a new license declined to be issued. Therefore, the Petitioners do not fall within the category of the persons who ought to exhaust the remedy of review under quoted provisions.
3. It was further submitted by counsel that the Petitioners are well within their rights to move the court to seek protection where the right or fundamental freedom to economic rights and property is likely to be adversely affected by administrative action, as they have the right to be given written reasons for the action. In this regard the Respondent has breached the right to fair administrative action by the oral announcement for the reasons: -
  - a. Prior and adequate notice of the nature and reasons for the proposed administrative action were not given.
  - b. An opportunity to be heard and to make representations in that regard was not accorded.
  - c. The decision to licence a liquor trade is individual and cannot be the subject of en masse pronouncement as to its regulation.
  - d. The Respondent as an administrator is enjoined to follow the [Fair Administrative Action Act, 2015](#) which it has regarded.
4. On the question on non-joinder, it was submitted for the Petitioners that Section 4(1) of the [Uasin Gishu County Alcoholic Drinks Control Act, 2014](#) established the County Alcoholic Drinks Control Board but however, the Petitioners are not aware of any decision taken by it to warrant its joinder in this matter. That the proper party according to the Petitioners is the Respondent which convened the public baraza. That if the Respondent insists on the Board being a party it ought to avail copies of its decision as taken against the Petitioners establishments.
5. In Support of their case, the Petitioners relied on the cases of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd*, (1969) EA 696 and [Aviation & Allied Workers Union Kenya v Kenya Airways Ltd & 3 others](#). Counsel prayed that the Preliminary Objection be dismissed with costs and the application for conservatory orders be allowed with costs.

### **Determination**

6. I have carefully considered the Preliminary Objection dated 20th May, 2024 and the submissions by both parties. The cardinal issue for determination is whether the Preliminary Objection raised by the Respondent is meritorious and sustainable in law.



7. A Preliminary Objection was described in the *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 to mean: -

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

8. In the said case, Sir Charles Newbold, P. stated:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

9. This position was further reinforced in the case of *Oraro v Mbaja* (2005) 1KLR 141, where the Court held that:

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence.”

10. The essence of fair administrative action as enshrined in Article 47 of the *Constitution* was well articulated in *Zacharia Kipkoros t/a Riverside Bar v County Chairman Liquor Licensing Committee & 2 Others* [2022] where the court pronounced itself thus:

“Article 47(2) of the *Constitution* is explicit that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”

11. The right to fair administrative action is not merely procedural but substantive, requiring that where individual rights are to be affected, each person must be accorded individualized consideration. As was aptly stated in the Kipkoros case (Supra): “The decision to licence a liquor trade is individual and cannot be the subject of en masse pronouncement as to its regulation.”

12. In the instant case, the Petitioners have demonstrated that their rights under Article 47 were infringed when the Respondent made blanket pronouncements affecting their businesses without according them prior notice or opportunity to be heard. The fact that the Respondents may have had regulatory authority does not obviate the need for procedural fairness. As was held in Kipkoros case (supra): “It is plain then that the Petitioner was never given an opportunity to be heard... It is also manifest that he was never served with written reasons... It is consequently my finding that his right to fair administrative action, as enshrined under Article 47 of the *Constitution* was thereby infringed.”

13. The uncontested facts before me reveal that the Petitioners were not given any written reasons for the impugned administrative action, nor were they accorded an opportunity to be heard before the pronouncements affecting their businesses were made. This falls far short of the constitutional threshold for fair administrative action.



14. The Respondent has raised several grounds in their Preliminary Objection, principally that the suit is incurably defective, that there is non-joinder of necessary parties, that this Court lacks jurisdiction, and that the Petitioners failed to exhaust available remedies. I shall address each ground in turn.
15. The effect of misjoinder of non-joinder of parties, is provided for by Order 1 Rule 9 of the Civil Procedure Rules, 2020, which make it patently clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit. It provides that:

“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”
16. The position herein is fortified by numerous decisions of our courts. Moreover, the Petitioners have adequately demonstrated that the County Government of Uasin Gishu, as the entity that convened the public baraza and issued the impugned directives, is the proper party before this Court.
17. Regarding jurisdiction, I am guided by the celebrated case of The Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Limited [1989] KLR 1, where the Court of Appeal pronounced itself thus:

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of Law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
18. In the present case, the Petitioners have approached this Court seeking protection of their constitutional rights under Article 47 of the Constitution and the Fair Administrative Action Act, 2015. The High Court’s jurisdiction to hear and determine such matters is clearly established under Articles 165(3)(b) and (d) of the Constitution. This is therefore properly within this Court’s jurisdiction.
19. On the doctrine of exhaustion, while I acknowledge its importance as affirmed in various decisions including Speaker of National Assembly v James Njenga Karume [1992] KLR 21, the circumstances of this case are distinguishable. The Petitioners have demonstrated that they are not challenging any decision regarding licensing but rather seeking protection against arbitrary administrative action affecting their existing valid licenses. The remedies under Sections 4, 10, 17 & 18 of the Uasin Gishu County Alcoholic Drinks Control Act, 2014 are therefore inapplicable in the present circumstances.
20. The upshot of my analysis is that the Preliminary Objection dated 20th May, 2024 is not merited. The objection does not raise pure points of law as required by the Mukisa Biscuits case, but rather seeks to venture into disputed factual territory that would require evidential proof. Moreover, the grounds raised are either misplaced or premature at this stage of the proceedings.
21. Consequently, I dismiss the Preliminary Objection with costs to the Petitioners. The substantive Petition shall proceed for hearing on merit.
22. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 23<sup>RD</sup> DAY OF DECEMBER, 2024**

.....  
**R. NYAKUNDI**  
**JUDGE**



In the presence of:

Mr. Mugambi, Advocate for the Applicant

